FILED
OCT 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-566

IN THE

# SUPREME COURT OF THE UNITED STATES

September Term, 1990

JOSEPH HUMENIK,
*Petitioner*

*v.*

OWENS-CORNING FIBERGLAS CORPORATION,
*Respondent*

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Bernard E. Kueny, III, Esquire
SWEENEY, SHEEHAN & SPENCER
1515 Market Street
19th Floor
Philadelphia, Pennsylvania 19102
(215) 563-9811

*Attorney for Respondent,*
*Owens-Corning Fiberglas*
*Corporation*

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9900

BEST AVAILABLE COPY

## QUESTION PRESENTED

Did the Trial Court and the Court of Appeals commit reversible error by ruling that the Federal Rules of Evidence apply in a case in which the Plaintiff alleges that he sustained an injury while serving aboard ship in the United States Navy, thereby allowing questioning of the Plaintiff regarding his pre-trial settlements with other named Defendants pursuant to Fed. R. Evid. 408, where Fed. R. Evid. 408 explicitly allows such questioning?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Table Of Contents | ii |
| Table Of Authorities | iii |
| Statement Of The Facts | 1 |
| Reasons For Denying The Writ | 4 |
| Conclusion | 13 |

## TABLE OF AUTHORITIES


*Cases:* Page

*Anderson v. Hughes,* 417 Pa. 87, 92, 208 A.2d 789 (1965) ..... 11

*Berliner v. Beeme Mfg. Co.,* 383 Pa. 458, 119 A.2d 65 (1956) ..... 11

*Borden, Inc. v. Florida East Coast Railway Co.,* 772 F.2d 750 (11th Cir. 1985)..... 9

*Caldarola v. Eckerd,* 332 U.S. 155, 67 S.Ct. 1569 (1947) ..... 12

*Carota v. Johns-Manville Corp.,* 893 F.2d 448 (1st Cir. 1990), *cert. denied,* ___ U.S. ___, 110 S.Ct. 3238..... 10

*Dollar v. Long Manufacturing, M.C., Inc.,* 561 F.2d 613, (5th Cir. 1977), *cert. denied* 435 U.S. 996 (1978) ..... 9

*Dudley v. South Jersey Metal, Inc.,* 555 F.2d 96 (3rd Cir. 1977) ..... 7

*Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817 (1938) ..... 7

*Executive Jet Aviation, Inc. v. Cleveland,* 409 U.S. 249, 93 S.Ct. 493 (1972)..... 12

*Hanna v. Plumer,* 380 U.S. 460, 85 S.Ct. 1136 (1965)..... 8, 9, 10, 12

*In Re: Air Crash Disaster Near Chicago, Illinois,* 701 F.2d 1189 (7th Cir. 1983), *cert. denied,* 464 U.S. 866., 104 S.Ct. 204 ..... 8

*King v. Gulf Oil Co.,* 581 F.2d 1184 (5th Cir. 1978) ..... 11

*Olympic Sports Products v. Universal Athletic Sales,* 760 F.2d 910 (9th Cir. 1985), *cert. denied,* 474 U.S. 1060, 106 S.Ct. 804 ..... 8

TABLE OF AUTHORITIES – *(Continued)*


*Cases:* Page

*Pollard v. Metropolitan Life Ins. Co.*, 598 F.2d 1284, 1286 (3rd Cir. 1979), *cert. denied* 442 U.S. 917 (1979) ..... 7

*Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231 (5th Cir. 1982) ..... 12

*Ricciardi v. Children's Hospital Medical Center*, 811 F.2d 18 (1st Cir. 1987) ..... 10

*Salas by Salas v. Wang*, 846 F.2d 897, 906 (3rd Cir. 1988) ..... 7, 10

*Weingrad v. Phila. Elec. Co.*, 324 Pa. Super. 16, 471 A.2d 100 (1984) ..... 11

*Statutes and Rules:*

28 U.S.C. §1333 ..... 12

28 U.S.C. §1652, Rules of Decision Act ..... 8

28 U.S.C. §2072, Federal Rules Enabling Act ..... 8

Fed. R. Evid. 101 ..... 7

Fed. R. Evid. 103 ..... 11

Fed. R. Evid. 408 ..... 6

Fed. R. Evid. 1101 ..... 7, 10, 12

Fed. R. Civ. P. 61 ..... 11

Sup. Ct. R. 10.1 (1990) ..... 5

42 Pa. C.S.A. 6141 ..... 10

*Texts:*

Wright and Miller, 19 *Federal Practice and Procedure*, §4512, p. 193 (1982) ..... 7

10 *Moore's Federal Practice*, §408.02 ..... 6

10 *Moore's Federal Practice*, §408.03 ..... 7

TABLE OF AUTHORITIES – *(Continued)*


| *Texts:* | Page |
|---|---|
| 10 *Moore's Federal Practice,* §408.06 ..... | 7 |
| 10 *Moore's Federal Practice,* §57 ..... | 8 |

No. 90-566

IN THE

# SUPREME COURT OF THE UNITED STATES

September Term, 1990

JOSEPH HUMENIK,

*Petitioner*

*v.*

OWENS-CORNING FIBERGLAS CORPORATION,

*Respondent*

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

### STATEMENT OF THE FACTS

Plaintiff/Appellant, Joseph Humenik (hereinafter "Humenik"), served in the United States Navy aboard the U.S.S. Albany from 1952 until 1956. (Record, 017-018, 027). The home port for the U.S.S. Albany was Norfolk, Virginia. (*Id.,* 18). In addition, Plaintiff alleged, in his Complaint, that he sustained asbestos exposure throughout his career as a Philadelphia policeman.

Humenik filed a Complaint with the United States District Court for the Eastern District of Pennsylvania on April 2, 1987, alleging, *inter alia,* that he sustained

injuries as a result of his exposure to asbestos-containing products manufactured, distributed and/or sold by the named Defendants. (Record, 004, 009-014).

Humenik testified that he was exposed to numerous asbestos products while serving in the United States Navy from 1952 until his discharge in 1956. (Record, 003, 013). Although he alleged in his Complaint that he was exposed to asbestos thereafter, there was no testimony on this point. It should be noted that during Humenik's term in the United States Navy, Defendant/Respondent, Owens-Corning Fiberglas Corporation (hereinafter "OCF"), did not manufacture any asbestos-containing products to which Humenik would have been exposed. It did, during that period of time, distribute a pipe covering product called Kaylo, which was manufactured by named Defendant, Owens-Illinois. (Record, 077, 081, Stipulation and OCF's Answers to Interrogatories read to the jury). At no time did Humenik testify that he inhaled any asbestos fibers from a Kaylo product. (Record, 048, *Passim*).

In addition to the testimony of Humenik, the jury heard the testimony of Dr. Allen Freedman, his medical expert. The jury also heard the testimony of Edward Ames, a former officer of OCF, by deposition. The Answers to Interrogatories of OCF were read into the record. The depositions of Eli Smith, William Groves and David Duram were read to the jury. These gentlemen worked at the Norfolk Naval Shipyard and were presumably offered to establish product identification. Finally, the jury heard the testimony of Amelia Gana, sister of Humenik. (Record, 079, *Passim*).

Humenik was cross-examined on various topics including his ability to perform normal and day-to-day tasks and activities around his home, his ability to work as a security guard for the Philadelphia Gas Works, his smoking history, his medical history, his activities in the Navy and his identification of other asbestos-containing products and their manufacturers, the fact that he did

not recall Kaylo, as well as his inconsistencies on direct examination. (Record, 043-055, 062-064). Humenik was also questioned regarding his alleged pre-trial settlements with other named Defendants. In most of his responses, Humenik professed ignorance. This line of questioning was explored after Humenik materially changed his identification of the manufacturer of one of the products to which he was allegedly exposed. At his deposition, Humenik identified "Johns-Manville" and "Corning." At trial, Humenik changed his testimony to identify "Owens-Corning". (Record, 024).

First, Plaintiff was confronted with his inconsistency, and he attempted to explain it away. (Record, 047-050). Significantly, Humenik did not identify Kaylo, the only asbestos-containing pipe covering which OCF distributed or supplied at the relevant times hereto. (*Id.*) Given his change from the deposition testimony, and the fact that he had settled with all of the Defendants, Humenik could have confused Corning Glass Works, Pittsburgh-Corning, Owens-Corning Fiberglas and Owens-Illinois, and counsel for OCF was entitled to demonstrate this for the jury. In addition, counsel for OCF was attempting to show that Humenik changed his testimony because of the pre-trial settlements. Because OCF was the only remaining Defendant, he had every incentive to heap as much of the blame for his alleged condition upon OCF as possible. Counsel for OCF was entitled to demonstrate this to the jury.

At the close of Humenik's case, counsel for OCF concluded, rightly, that Humenik had failed to carry his burden of proof, and decided, for strategic purposes, not to present any evidence. This decision was ultimately proven correct by the jury which found in favor of all Defendants, including OCF, and against Humenik.

The jury was charged by the Honorable Clifford Scott Green, and the jury members were provided with Jury Interrogatories. (Record, 147-156). In answering the Jury Interrogatories, the jury found that Humenik

sustained an asbestos-related disease, however, they further found that each and every Defendant had not manufactured, supplied or distributed a product which was a substantial contributing factor to that disease. Likewise, the jury found that each and every Defendant had not acted negligently in producing the asbestos-related injury. (Record, 164-166). In light of the Jury Interrogatories, the Honorable Clifford Scott Green molded the verdict in favor of Defendants and against Plaintiff. (Record, 168).

Humenik contends that the jury was unduly prejudiced by the particular portion of the cross-examination dealing with the alleged pre-trial settlements. (It should be noted that the existence of most of these pre-trial settlements were not established as Humenik professed ignorance of them. In addition, Humenik's counsel's details which were provided to the Third Circuit and this Honorable Court were not part of the record at trial, and the details were unknown to counsel for OCF at the time of questioning.) In fact, the Jury Interrogatories indicate that this particular line of questioning had very little impact. Had the jury been impressed by the line of questioning, the answers to Jury Interrogatories would have indicated that the settling Defendants were the responsible parties. The answers to the Jury Interrogatories revealed that Plaintiff failed to establish a *prima facie* case against any of the Defendants and that Humenik had failed to establish that any of the Defendants were responsible for his injuries. (Record, 164-167).

## REASONS FOR DENYING THE WRIT

The Rules of the Supreme Court contain the following provisions regarding considerations governing a review on a Writ of Certiorari:

> A review on Writ of Certiorari is not a matter of right, but of judicial discretion. A Petition for a Writ of

BEST AVA

> Certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> . . .
>
> (c) When a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with the applicable decisions of this Court.

Sup. Ct. R. 10.1 (1990).

In the case *sub judice,* the Court should deny the Petitioner's Writ because the Writ presents no important legal issues, nor would it serve to correct any conflict among the Court of Appeals. Furthermore, the granting of the Writ would not enhance the certainty and consistency of the laws applied in Federal Court. This issue has been raised in the past, and this Honorable Court has seen fit to deny similar Writs. Finally, granting of the Writ would reward the Petitioner's mischaracterizations of the existing law, distortions of the facts of the case, and gerrymandering of the legal issues presented.

LABLE COPY

## I. The Trial Court And The Court Of Appeals Did Not Commit Reversible Error By Ruling That The Federal Rules Of Evidence Apply In This Case And That Plaintiff Could Be Questioned About His Pre-Trial Settlements Pursuant To Fed. R. Evid. 408

### A. The Federal Rules Of Evidence Should Apply In This Case

The Federal Rules of Evidence contain the following provisions regarding compromise and offers to compromise:

> Evidence of . . . accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability or invalidity of the claim or its amount . . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness . . .

Fed. R. Evid. 408.

An analysis of Rule 408 reveals that the "objective is to encourage compromise of disputed claims by protecting compromise agreements and negotiations aimed at reaching such agreements." 10 *Moore's Federal Practice,* §408.02 (citations omitted). This is the very same policy which Humenik erroneously claims can only be served by application of Pennsylvania Rules.

Although the Rule provides for the exclusion of evidence regarding a settlement in some instances, it has been noted as follows:

> [T]he language of the Rule is deliberately specific in an effort to define the limit of the exclusionary rule. Only evidence of an "Offer of Compromise *where the claim is disputed* as to the validity or amount is excluded." (emphasis original) . . . and if the evidence is offered for any other purpose than to prove

> liability or invalidity of a claim or amount, it is admissible if relevant and not unduly prejudicial.

*Id.* §§408.03 and 408.06.

Humenik alleges that the Federal Rules of Evidence should not apply in this action, but the law of the forum state should apply. However, the Federal Rules of Evidence contain the following provisions regarding their scope:

> These Rules govern proceedings in the Courts of the United States . . . to the extent and with the exceptions stated in Rule 1101.

Fed. R. Evid. 101.

> (a) Courts and magistrates. – These Rules apply to the United States District Courts . . . in the actions, cases and proceedings and to the extent hereinafter set forth . . .
>
> (b) Proceedings generally. – These Rules apply generally to civil actions and proceedings . . .

Fed. R. Evid. 1101.

In interpreting the above-cited provisions of the Federal Rules of Evidence, the Courts have held that the Rules of Evidence are "largely procedural." *Salas by Salas v. Wang,* 846 F.2d 897, 906 (3rd Cir. 1988); *Pollard v. Metropolitan Life Ins. Co.,* 598 F.2d 1284, 1286 (3rd Cir. 1979), *cert. denied,* 442 U.S. 917 (1979) (Federal Rules apply to the admissibility of documentary evidence in a diversity case); *Dudley v. South Jersey Metal, Inc.,* 555 F.2d 96 (3rd Cir. 1977) (Federal Rules of Evidence are held to be procedural regarding the admissibility of expert testimony on aggregate damages); Wright and Miller, 19 *Federal Practice Procedure,* §4512, p. 193 (1982).

In support of his proposition, Humenik relies upon *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817

(1938). Humenik's reliance thereon is misplaced. In *Hanna v. Plumer,* 380 U.S. 460, 85 S.Ct. 1136 (1965), the United States Supreme Court held that in cases where both a state rule and a federal rule cover the situation, the federal courts must apply the federal rule. *Id.,* at 471. *Erie,* on the other hand, applies only in cases where no federal rule directly addresses a situation. *Id.,* at 469-71; *See also, Olympic Sports Products v. Universal Athletic Sales,* 760 F.2d 910 (9th Cir. 1985), *cert. denied,* 464 U.S. 866, 104 S.Ct. 204. In *Olympic,* the Ninth Circuit held that the Federal Rule concerning dismissal of actions applies in a diversity matter. *Id.*

The Seventh Circuit was faced with the issue of applying federal or state evidentiary laws in a personal injury action. In finding that the Federal Rules of Evidence applied, the Court reasoned as follows:

> . . . If the Rules had been promulgated under the Supreme Court's rule-making power, 28 U.S.C. §2072 (1976), and did not transgress the limits of that power, this would be true under the reasoning of *Hanna v. Plumer, supra.* But the Rules of Evidence stand on even firmer footing, for they are statutory. Pub.L. 93-595, 88 Stat. 1959 (1975). In such a case, the Rules of Decision Act, 28 U.S.C. §1652 (1976), coupled with the supremacy clause of the United States Constitution, demands that the Rules apply in Federal Court, unless Congress exceeded its powers to regulate Federal Courts in enacting them. The parties have not urged us to find, and we are not prepared to hold, that the Rules are unconstitutional. See 10 J. Moore and H. Bendix Federal Practice §57 (2d Ed. 1982).

*In Re: Air Crash Disaster Near Chicago, Illinois,* 701 F.2d 1189, 1193 (7th Cir. 1983), *cert. denied,* 464 U.S. 866, 104 S.Ct. 204.

In reaching its decision, the Seventh Circuit noted that its conclusion was "supported by many cases holding that the Federal Rules of Evidence govern the admissibility of evidence in diversity cases. This result conforms with the practice in federal courts preceding the adaption of the Federal Rules of Evidence." (citations omitted) *Id.,* 1193.

Humenik alleges that he was prejudiced by the questioning regarding settlements. According to Humenik, the admissibility of such questioning should therefore be considered substantive because it allegedly affected the outcome of the case. At the outset, it must be noted that there is no evidence that the questioning affected the outcome. On the contrary, the Jury Interrogatories demonstrate that the jury was not affected by the questioning to any great extent. Had the jury been swayed by that particular line of questioning, the answers to Interrogatories should have indicated that those parties with whom Humenik had settled were the responsible parties. In fact, Jury Interrogatories confirm the obvious, that Humenik failed to establish a *prima facie* case against any of the named Defendants.

The Courts have held that unfair prejudice "cannot be equated with evidence that is simply adverse to the opposing party." *Borden, Inc. v. Florida East Coast Railway Co.,* 772 F.2d 750, 756 (11th Cir. 1985); *Dollar v. Long Manufacturing, M.C., Inc.,* 561 F.2d 613, 618 (5th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978). The court further concluded that in a diversity case involving property damage, the admissibility of evidence was governed by federal law. *Borden, supra,* at 754 (citations omitted).

In *Hanna, supra,* the Court held that in a diversity case where a federal and state rule governed a disputed issue and are in direct conflict, the federal rule must be applied if it meets the "rationally capable of classification [as procedural]" test, or, in the words of Justice Harlan, if it is "arguably procedural." *Hanna v. Plumer, supra,*

380 U.S. at 476 (citations omitted) (Harlan concurring) (footnote omitted). "We are thus bound to apply the federal rules so long as they can rationally be viewed as procedural" (footnote omitted). *Salas by Salas v. Wang, supra,* 846 F.2d at 904-906.

In support of his position, Humenik relies upon *Carota v. Johns-Manville Corp.,* 893 F.2d 448 (1st Cir. 1990), *cert. denied,* ____ U.S. ____, 110 S.Ct. 3238. However, this authority is inapposite to his contentions. In *Carota,* both the Federal Rules of Evidence and state law permitted the introduction of pre-trial settlements. *Id.* In that case, the Court held that evidence regarding pre-trial settlements was admissible despite the Plaintiff's contentions that such a holding would arguably undermine the federal policy of compromise and settlement of disputes. *Id.* Accordingly, the First Circuit adopted a holding that is urged here by the Respondent: that the Federal Court did not err in admitting the evidence of third-party settlements.

Humenik also relies upon *Ricciardi v. Children's Hospital Medical Center,* 811 F.2d 18 (1st Cir. 1987). Again, the holding in *Ricciardi* is inapposite to Humenik's contentions. In *Ricciardi,* the First Circuit held that the Federal Rules of Evidence applied to all cases in District Court, "including diversity actions." *Id.,* p. 21 (citations omitted). In reaching its conclusions, the First Circuit relied upon the Fed. R. Evid. 1101(b) and *Hanna v. Plumer, supra.* In *Ricciardi,* the First Circuit held that applying the Federal Rules of Evidence did not impinge upon any state substantive rule. *Id.*

### B. The Pennsylvania Rules Of Evidence Do Not Apply In this Matter

Humenik urges that the Trial Court should have adopted the Pennsylvania Rules of Evidence, specifically 42 Pa. C.S.A. §6141. In so arguing, Humenik contends that said statute is a substantive state statute. Said

statutory provision is found in the volume entitled "Judiciary and Judicial Procedure." Specifically, it is found in Chapter 61 which is entitled "Rules of Evidence." To argue that procedural state statutes are substantive is ridiculous. Also, to argue that state rules of evidence supersede the federal rules of evidence in Federal Court is equally absurd.

In interpreting Section 6141 of the Pennsylvania Rules of Evidence, the Pennsylvania Courts have held that admission of a pre-trial settlement "does not necessarily require that a new trial be held." *Weingrad v. Phila. Elec. Co.,* 324 Pa. Super. 16, 471 A.2d 100 (1984). In *Weingrad,* the Plaintiff settled with one of the named Defendants, and this fact was announced by the Judge to the jury. In addition to reaching a verdict, the jury answered special Interrogatories in which they found that none of the named Defendants were negligent, but that the Plaintiff's decedent was negligent. *Id.,* 101-103. In finding that the Plaintiff was not entitled to a new trial, the court relied upon a Pennsylvania Supreme Court holding which requires that a "ruling on evidence or an instruction to the jury must be shown not only to have been erroneous but harmful to the party complaining." *Id.,* at 103, citing *Anderson v. Hughes,* 417 Pa. 87, 92, 208 A.2d 789, 791 (1965). The court concluded, in *Weingrad,* that because the jury found none of the Defendants were negligent, the admission into evidence of the settlement was harmless error. "The special findings of the jury which served to resolve the factual dispute between the parties must be taken as a final adjudication of these factual questions, unless for some proper reason, the Court set (sic) them aside." *Id.,* at 103, quoting *Berliner v. Beeme Mfg. Co.,* 383 Pa. 458, 119 A.2d 65 (1956).

Under a Federal Standard of Review, errors in evidentiary rulings are not reversible unless prejudicial harm results. Fed. R. Civ. P. 61; Fed. R. Evid. 103; *King*

*v. Gulf Oil Co.,* 581 F.2d 1184 (5th Cir. 1978); *Rabon v. Automatic Fasteners, Inc.,* 672 F.2d 1231 (5th Cir. 1982).

### C. There Is No Reason Why Pennsylvania Law Should Apply

At the close of trial, there was no evidence that Humenik sustained any exposure to asbestos-containing products while in Pennsylvania. On the contrary, he presented evidence only that he sustained asbestos exposure while serving aboard ship in the United States Navy. (Record, 17, 27). In the case *sub judice,* the trial court should have applied admiralty jurisdiction.

The Plaintiff need not invoke 28 U.S.C. §1333 in order to have his Complaint sound in admiralty. All that need be shown to invoke admiralty is that the case is suable in Federal Court. *Caldarola v. Eckerd,* 332 U.S. 155, 67 S.Ct. 1569 (1947). It must also be shown that admiralty jurisdiction lies. Admiralty jurisdiction is based upon the locality of the tort and whether the event in question has a "significant relationship to traditional maritime activity." *Executive Jet Aviation, Inc. v. Cleveland,* 409 U.S. 249, 93 S.Ct. 493 (1972).

With respect to the applicability of the Rules of Evidence to maritime cases, the Federal Rules of Evidence contain the following provisions:

> These Rules apply generally to civil actions and proceedings including admiralty and maritime cases
>
> . . .

Fed. R. Evid. 1101(b).

## CONCLUSION

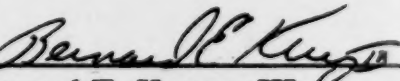
In the case *sub judice,* there is no compelling reason for granting the Writ of Certiorari. There is no dispute among the various circuits as the Lower Courts have uniformly applied the Federal Rules of Evidence to cases involving admiralty or diversity jurisdiction. Furthermore, the Lower Courts have consistently applied the Federal Rules of Evidence where the application would result in the admission, as opposed to the exclusion, of evidence.

Humenik has made no showing as to why the Pennsylvania Civil Rules of Evidence should be considered substantive other than the bald assertion that he was unfairly prejudiced in this particular case. In fact, there has been no showing whatsoever that he was unfairly prejudiced in this case, nor is there a showing that the ruling affected the outcome of the trial.

The issue as to whether the Federal Rules of Evidence should apply has come before this Court on numerous occasions, and has been definitively ruled upon by this Court in *Hanna v. Plumer, supra,* and its progeny. Since that time, the Lower Courts have been able to apply the Rules of Evidence without conflict and in a just manner. On numerous occasions, this Court has seen fit to deny similar Writs of Certiorari, and it is urged that the Court do so again in this instance.

WHEREFORE, for the foregoing reasons, Respondent respectfully requests this Honorable Court deny Petitioner's Writ for Certiorari.

Respectfully submitted,
SWEENEY, SHEEHAN & SPENCER

By: 
Bernard E. Kueny, III
*Attorney for Respondent*
*Owens-Corning Fiberglas Corporation*

Dated: October 29, 1990